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SUPREME COURT OF THE UNITED STATES

OCTOBER 1948 TERM

No. ———

AKERS MOTOR LINES, INC.,

Petitioner

versus

R. S. NEWMAN AND GARLAND WARREN,

Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Akers Motor Lines, Inc., naming as respondents R. S. Newman and Garland Warren, respectfully shows:

STATEMENT OF MATTER INVOLVED

Mrs. S. C. Reese, a Georgia resident, instituted an action in the Superior Court of Fulton County, Georgia, against Akers Motor Lines, Inc., a North Carolina corporation, for personal injuries sustained in a collision between an auto-

mobile driven by her and a tractor-trailer unit driven by one Garland Warren, allegedly while acting within the scope of his employment as an agent and servant of Akers Motor Lines, Inc. (R. 3, 4). The amount involved being in excess of $3,000.00 and diversity of citizenship appearing, the case was removed to the United States District Court for the Northern District of Georgia (Atlanta Division) (R. 2). Before service of its answer, Akers Motor Lines, Inc., moved for an order permitting it to file a third-party complaint, naming Garland Warren, the tractor-trailer driver, and R. S. Newman as third-party defendants (R. 12), which motion was allowed (R. 12). Both the third-party defendants were residents of Georgia. As amended, the third-party complaint alleged that Garland Warren was not acting under the direction and control of Akers Motor Lines, Inc., as its agent, servant and employee at the time of the occurrence but was either on a personal mission or was employed, directed in his activities, supervised, etc., by third-party defendant, R. S. Newman, who was the owner of the tractor-trailer being driven by Warren (R. 13, 15). The prayer of the third-party complaint as amended was:

> "Wherefore, Akers Motor Lines demands that whatever judgment plaintiff recovers, if any, be awarded against third-party defendant Garland Warren and/or the third-party defendant R. S. Newman as the evidence may authorize and not against defendant, Akers Motor Lines, Inc., *or*, if against Akers Motor Lines, Inc., also against third-party defendant Garland Warren and/or third-party defendant R. S. Newman as the evidence may authorize, *and that Akers Motor Lines, Inc., have judgment against R. S. Newman and Garland Warren for any sum that may be recovered against it by plaintiff, Mrs. S. C. Reese.*" (R. 15) (emphasis supplied)

Third-party defendants moved to dismiss the third-party complaint (R. 17). The District Court sustained the motion to dismiss (R. 19). The case was appealed to the United States Circuit Court of Appeals for the Fifth Circuit

where it was affirmed on June 30, 1948. A petition for rehearing was filed by Akers Motor Lines, Inc., July 21, 1948 (R. 32) and denied August 3, 1948 (R. 38). This petition for writ of certiorari is filed within three months thereafter.

JURISDICTIONAL STATEMENT

This Court is asked to exercise its discretion to assume jurisdiction under 28 U.S.C.A., § 347(a) to construe Rule 14(a) of the Rules of Civil Procedure (following 28 U.S.C.A., § 723(c)) in view of the importance of this procedural rule and the conflict of the decisions of Circuit Courts of Appeal as shown under "reasons for granting writ."

QUESTION PRESENTED

Where, in a suit brought by a resident defendant against a non-resident, a case is removed from a State Court to a United States District Court because of diversity of citizenship and the amount involved exceeds Three Thousand Dollars, exclusive of interest and cost, and where the defendant, as a third-party plaintiff, pursuant to leave granted before filing answer, causes a third-party complaint to be served upon resident third-party defendants alleging that they, and not the defendant and third-party plaintiff, are responsible to the plaintiff and not only tenders these parties to the plaintiff but demands a judgment over against the plaintiff for indemnity in the event defendant and third-party plaintiff is held liable, and where the law of the state where the cause of action arose and the case is pending recognizes the right of indemnity under the circumstances involved, is the third-party complaint subject to dismissal because the United States District Court is without jurisdiction by reason of the common citizenship of the plaintiff and the third-party defendants?

REASONS FOR GRANTING WRIT

1. The decision of the Fifth Circuit Court of Appeals in the instant case (R. 28) held that the third-party complaint should be dismissed for lack of jurisdiction. The United States Circuit Court of Appeals for the 3rd Circuit in a decision in the case of *Sheppard* v. *Atlantic States Gas Company of Pennsylvania, Inc.* (Pennsylvania R. Co., et al., Third-Party Defendants), 167 Fed. (2nd) 841 in advance sheet of June 21, 1948, reached a different result on basically the same factual situation.

2. The United States Circuit Court of Appeals for the Fifth Circuit, by its decision, has denied relief in this case to Petitioner, as the alleged master, for indemnity to which it is entitled against its alleged servant (should petitioner be held liable). Since the negligence charged to petitioner is entirely derivative and no element of joint positive wrongdoing is involved, the Georgia law as to its right is clear. See:

Central of Georgia Ry Co. v. *Macon Railway and Light Company,* 9 Ga. App. 628, 631, 632, 71 S. E. 1076, 1079, 1080 (1911)

Central of Georgia Railway Company v. *Macon Railway and Light Company,* 140 Ga. 309, 78 S. E. 931 (1913)

Georgia Power Co. v. *Banning Cotton Mills,* 42 Ga. App. 671, 157 S. E. 525 (1930)

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George A. Hormel & Co. v. *General Motors Truck Co.,* 55 Ga. App. 476, 190 S. E. 415 (1937)

3. The question presented in the instant case, involving the rights of a defendant to bring in third-party defendants under Rule 14 (a) of the Rules of Civil Procedure is an important question of Federal procedural law which has not been, but should be, settled by this Court.

4. The United States Circuit Court of Appeals for the Fifth Circuit, in the instant case, by reaching a decision exactly contrary to the conclusion reached by that Court in the case of *Williams et al* v. *Keyes et al,* 125 Fed. (2d) 208 (certiorari denied 316 U. S. 699, 62 S. Ct. 1297, 86 L. Ed. 1768), where the citizenship of the parties with respect to diversity was identical and the only distinguishing feature was that the *Williams* case involved contract law and the instant case involved tort law, has so far departed from the accepted and usual course of judicial proceedings on an important procedural matter as to call for an exercise of this court's power of supervision.

PETITION FOR REHEARING IN COURT BELOW RAISED SAME QUESTIONS AS THIS PETITION

The petition for rehearing filed in the court below brought to the attention of that Court the reasons herein assigned for the granting of the writ of certiorari and asked for rehearing on account thereof. (R. 32-37).

WHEREFORE, petitioner prays that this its petition for writ of certiorari be granted and that upon a consideration of the cause by this court that the judgment of the court below be reversed.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PART I—FACTS

These are sufficiently shown in "Statement of Matter Involved" division of the petition for writ of certiorari.

PART II—ARGUMENT

The importance of the application of Rule 14 (a) is so obvious that it will not be argued except to say that the same situation arises almost daily and the circuit courts have reached different conclusions with respect to the proper application of the rule. This Court's power of supervision for the purpose of harmonizing these decisions is, of course, most desirable.

In the instant case, at the time of removal, the cause stood bona fide as one between a resident plaintiff and a non-resident defendant. Federal jurisdiction was thus shown and the fact that residents were brought in as third-party defendants, subsequent to removal, should not divest the Federal court of jurisdiction. The Fifth Circuit agreed with this in the case of *Williams et al* v. *Keyes et al*, 125 Fed. (2d) 208, 209, in the following language:

> "At the time of removal, the cause stood bona fide as one between resident plaintiffs and a single non-resident defendant. Federal jurisdiction was then shown, and the fact that citizens of Florida were brought in as third-party defendants subsequent to removal did not divest the Federal court of jurisdiction."

This court denied certiorari in the *Williams* case (316 U. S. 699, 62 S. Ct. 1297, 86 L. Ed. 1768).

Where the factual situation with respect to diversity was the same, the United States Circuit Court of Appeals for the Third Circuit in the case of *Sheppard* v. *Atlantic States Gas Company of Pennsylvania, Inc.* (Pennsylvania R. Co.,

et al., Third-Party Defendants), 167 Fed. (2nd) 841, held that the court had jurisdiction of a third-party complaint:

> "Rule 82 of the Federal Rules does provide that 'These rules shall not be construed to extend * * * the jurisdiction of the district courts of the United States.' However, in connection with this fundamental doctrine it is to be remembered that the type of third-party suit under consideration is ancillary to the main action and presupposes that the latter has met the jurisdictional diversity requirements. Williams v. Keyes, 5 Cir. 125 F. 2d 208, certiorari denied 316 U. S. 699, 62 S. Ct. 1297, 86 L. Ed. 1768, and see cases collected 1 Moore's Federal Practice 1947 Supplement 378. Therefore, at least within the present facts where the plaintiff seeks no recovery against the third-party defendants, we think the inclusion of the third-party claim is justified though it does not of itself meet the diversity test. We base this not on any theory of extension of jurisdiction but in order to effectively dispose of the entire related litigation in the suit which is already properly before the court and thus carry out the purpose of Rule 14. 1 Moore's Federal Practice 782. 'Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power.' Lesnik v. Public Industrials Corporation, 2 Cir., 144 F. 2d 968, 973."

If defendant and third-party plaintiff be held liable by reason of the allegations (and proof in support thereof) of the plaintiff's petition, then, under the Georgia law, the negligence being entirely derivative (R. 6, 7), it would be entitled to a judgment over in indemnity against its servant, Garland Warren. The leading case in Georgia on this matter is *Central of Georgia Ry. Co.* v. *Macon Railway and Light Company*, 9 Ga. App. 628, 631, 632, 71 S. E. 1076, 1079, 1080 (1911), where the court stated:

> "The duty to indemnify may arise from relationship either contractual or non-contractual—express or implied agreements to indemnify, or may arise from operation of law independently of contract."

In discussing the general rule that contribution may not be enforced between joint, concurring wrongdoers who were not sued jointly, the court said:

> "But there may be cases in which a person who has suffered loss or damage may have the right to sue two persons as if they were joint wrong-doers, without their being, as among themselves, joint wrong-doers. A's servant, B, negligently injures C in the performance of A's work. From C's standpoint, A and B are joint wrong-doers, but as among themselves B is joint wrong-doer and A is subjected to liability merely by the doctrine of respondeat superior; so that, if C sues A alone and compels him to pay the damage, A, in turn, may compel B to indemnify him for the loss. So in this class of cases it is always relevant to inquire, 'Whose wrong really caused the damage?' "

See also:

Central of Georgia Railway Company v. *Macon Railway and Light Company*, 140 Ga. 309, 78 S. E. 931 (1913)

Georgia Power Co. v. *Banning Cotton Mills*, 42 Ga. App. 671, 157 S. E. 525 (1930)

Advanced Refrigeration, Inc. v. *United Motors Service Inc.*, 69 Ga. App. 783, 26 S. E. 2nd 789 (1943)

George A. Hormel & Co. v. *General Motors Truck Co.*, 55 Ga. App. 476, 190 S. E. 415 (1937)

If the third-party complaint in the instant case be ancillary it is unimportant that there is no diversity of citizenship as between the plaintiff and the third-party defendants. If the third-party complaint in the instant case be construed as an independent claim arising out of the same transaction, then diversity of citizenship does exist as between the third-party plaintiff and the third-party defendants and there would be no basis for the court's denial of jurisdiction.

In conclusion, it is respectfully submitted that the decision of the court below in the instant case was such as to defeat the intent and purpose of the Rules of Civil Procedure as expressed in Rule 1:

"They shall be construed to secure the just, speedy, and inexpensive determination of every action."

The effect of the decision in the instant case is to require two trials of the same cause, which is neither just, speedy, nor inexpensive.

Respectfully submitted
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 273

AKERS MOTOR LINES, INC.,

Petitioner

versus

R. S. NEWMAN AND GARLAND WARREN

Respondents

Brief of Respondents opposing grant of Writ of Certiorari

Part I

STATEMENT OF CASE

Plaintiff, Mrs. Reese, a citizen and resident of Georgia, sued Akers Motor Lines, Inc., in a common law tort action for the negligence of Garland Warren, the alleged servant of defendant. (R. 3, 4.) Akers Motor Lines, Inc. filed its answer in which it expressly denied that Warren was its servant and further denied that he was acting at the time about the business of defendant. This answer also set up affirmatively that "Warren was the employee of one R. S. Newman" from whom he took orders and received pay, and who on the occasion of the occurrence complained of

"was driving equipment which belonged to R. S. Newman." (R. 11.)

Akers Motor Lines, Inc., also filed third-party proceedings against Warren and Newman in which the allegation of Mrs. Reese's petition respecting the agency of Warren was traversed. (R. 13, 14.) Affirmatively, it was therein alleged that the equipment driven by Warren at the time in question was owned by Newman; that said equipment was not driven at the time on any business of Akers Motor Lines, Inc.; that defendant neither authorized nor directed the use of said equipment for the purpose for which it was being used, nor was it responsible therefor; that said Warren was at the time employed, paid, supervised and directed in his work by Newman, was engaged in and about the business of said Newman and was acting within the scope of his employment. (R. 14.)

The third-party complaint was later amended by alleging that plaintiff was a citizen and resident of the State of Georgia, and Newman and Warren were citizens and residents of Coweta County, Georgia; that the third-party complaint was ancillary to the main case and should the court determine that the defendant was liable, "the negligence charged against it being entirely derivative, it would be entitled to judgment over against the driver, or third-party defendant Garland Warren. And perhaps under some circumstances, it would be entitled to judgment against the third-party defendant, R. S. Newman." (R. 15, 16.)

The two-fold prayer of the third-party complaint, stated alternatively, was as follows:

Akers Motor Lines, Inc. demands (a) "that whatever judgment plaintiff recovers, if any, be awarded against third-party defendant, Garland Warren and/or the third-party defendant, R. S. Newman, as the evidence may authorize and not against defendant Akers Motor Lines, Inc.,

or (b) if against Akers Motor Lines, Inc., also against third-party defendant Garland Warren and/or third-party defendant R. S. Newman as the evidence may authorize *and* that Akers Motor Lines, Inc., have judgment against R. S. Newman and Garland Warren for any sum that may be recovered against it by plaintiff, Mrs. S. C. Reese." (R. 15) (Emphasis and (a) and (b) supplied.)

The District Court dismissed the third-party complaint (R. 19) and the case was carried to the Fifth Circuit for review, where the judgment of the lower court was affirmed.

QUESTION PRESENTED

The petition for writ of certiorari presents the question to be decided in an aspect which is not properly to be considered. The case turns largely upon the construction to be placed upon the facts alleged in the third-party complaint. These allegations, properly construed, and the opinion of the Circuit Court thereon, respondents contend, present this question:

Did the District Court, in a case where its jurisdiction was acquired for diversity of citizenship, have jurisdiction of third-party defendants in a third-party complaint which asserted for third-party plaintiff no right of action either for indemnity or contribution ancillary to the cause alleged in the original complaint, but rather attempted to offer new defendants and substitute a wholly separate and distinct cause from that alleged in the original complaint, the plaintiff being a citizen and resident of the State of Georgia, and the third-party defendants likewise being citizens and residents of the State of Georgia?

Part II

BRIEF OF LAW AND ARGUMENT

QUESTION NOT OF GENERAL IMPORTANCE

The importance of the application of Rule 14 (a) and Rule 82 of the Federal Rules, cannot be gainsaid. This case, however, does not present a matter of peculiar gravity and general importance because, at last, it turns upon the construction to be given to the language employed in the third-party complaint. The precise or even the approximate presentation of another case for consideration by any court will, in all probability, never again occur. The decision of this court, if the case goes to a conclusion, would probably never become a physical precedent because it is most unlikely that any subsequent pleader would follow the pattern here presented. The judgment of the District Court and the opinion of the Fifth Circuit Court distinctly disclosed that, because of the verbiage of the third-party complaint, it was construed not to be one that might properly come within the spirit and meaning of Rule 14 (a).

American Construction Company v. *Jacksonville T.& K. W. R. Co.*, 148 U. S. 372, 383; 37 L. Ed. 486 (6).

Caroline M. Forsyth v. *City of Hammond, et al.*, 166 U. S. 506, 514; 41 L. Ed. 1095 (2).

No question of lack of uniformity of decisions as between the several Circuit Courts is involved, as will hereinafter be pointed out.

NO RIGHT OF INDEMNITY

The record discloses that Mrs. Reese, (R. 3), brought suit against Akers Motor Lines, Inc., because of personal injuries alleged to have been sustained in the collision of an automobile in which she was riding with the truck of Akers

Motor Lines, Inc., which was being driven by Garland Warren, alleged to be a servant and agent of Akers Motor Lines, Inc. (R. 4.)

All paragraphs of the complaint relative to the agency of Warren (R. 9) were specifically denied in the answer filed by defendant. Further, defendant alleged that the truck driver, Warren, was neither its employee, nor was he acting about its business but that he was an employee of R. S. Newman, from whom he took orders, received pay and for whom he operated a truck at the time in question. (R. 10, 11.)

Generally speaking, it is encumbent upon the plaintiff to give in his complaint a state of facts which authorizes the relief prayed for. That rule should be made to apply to a third-party plaintiff. The non-observance of this rule in this case, respondents contend, affords a firm basis for the decision and opinion of the Fifth Circuit Court.

The original complaint of Mrs. Reese set up a common law tort action, wherein she attempted to fix liability upon the defendant because of the negligent act of one of its servants. It would be proper, in such a case, for the defendant to file third-party proceedings and show a state of facts which would entitle him to be indemnified by the servant. However, the third-party plaintiff must allege facts showing his right to be indemnified. A third-party defendant who is a joint tort feasor, may likewise be brought in in those jurisdictions where the right of contribution exists.

Akers Motor Lines, Inc., makes no claim in the third-party complaint that either Warren or Newman were joint tort feasors. It makes no such claim in the petition for certiorari. Therefore, the case must turn entirely on the question of whether or not Akers Motor Lines, Inc., was

entitled to be indemnified as to Newman and Warren by reason of the facts set up in the third-party complaint.

Measured by the test that the third-party complaint must show a right of indemnity against the third-party defendants, respondents contend that this complaint entirely fails.

No facts are alleged which show any reason why third-party plaintiff would be entitled to be indemnified as to Garland Warren. It would have been a simple matter for Akers Motor Lines, Inc., to have set up such a claim in its complaint. It would have required little else than a simple affirmation that Warren was its servant at the time in question. But that is the one fact vigorously and repeatedly denied, not only in its answer to Mrs. Reese's complaint (R. 9, 10, 11), but also throughout the third-party complaint (R. 13, 14).

No contractual relation exists between the two insofar as the complaint discloses. The complaint denies that the vehicle was being driven on any business of Akers Motor Lines, Inc., and it denies that Akers Motor Lines, Inc. was the owner of the vehicle or in any way authorized or directed its use at the time and place in question. Further, this complaint charges, alternatively, that Warren, at the time and place in question, was a servant and agent of Newman and engaged in and about his master's business or that he was engaged in a purely personal mission. Those allegations of fact in any of the pleadings which would have given Akers Motor Lines, Inc. the right to be indemnified because of the negligent conduct of Warren were not only expressly denied and repudiated, but all other affirmative facts set up in the third-party complaint distinctly negative the idea that Akers Motor Lines, Inc. was entitled to be indemnified with regard to Warren's conduct.

The only thing that can be found in the third-party complaint which would tend to support such a claim is contained

in paragraph 10 of the amendment (R. 16) and in the prayer of the original complaint (R. 15). Paragraph 10 contains the following legal conclusion: "Should the Court determine that defendant and third-party plaintiff were liable, the negligence charged to it being entirely derivative, it would be entitled to judgment over against the driver or third-party defendant Garland Warren." This conclusion must yield to the remainder of the complaint which several times denied that Garland Warren was the servant and agent of defendant Akers Motor Lines, Inc.

With regard to Newman, the complaint is silent as to a contractual relation between him and Akers Motor Lines, Inc. which would give rise to the right of indemnification. Newman is not alleged to be a servant. Insofar as the pleadings show, Newman is an utter stranger to Akers Motor Lines, Inc. The amendment to the third-party complaint does contain a veiled conclusion as follows: "That perhaps, under some circumstances it (Akers Motor Lines, Inc.) would be entitled to a judgment against the third-party defendant, R. S. Newman, since he furnished the driver, Garland Warren, and directed him in his activities." (R. 16.) Will an allegation so vague, indefinite, uncertain and speculative, be deemed to afford sufficient basis for the court to compel one to appear and assume the defense of a case like the one at bar? Ought one to be required to answer a complaint because it is therein alleged that "perhaps, under some circumstances, he might be liable to another?"

It will be observed that the prayer of the third-party plaintiff is in the alternative. First, it asks that the judgment be awarded against Newman and Warren and not against Akers Motor Lines, Inc. Then, in the alternative, it prays if the judgment is against Akers Motor Lines, Inc., that it also be against Newman *and* Warren *and* that Akers Motor

Lines, Inc. have judgment against Newman *and* Warren for any sum recovered by Mrs. Reese.

The prayer ought not to be considered as a substitute for necessary allegations of fact, and even though Akers Motor Lines, Inc. asks for judgment over against Newman *and* Warren, that ought not to supply a manifest deficiency in pleading essential facts as a basis for such judgment. If we omit that part of the prayer which asks that judgment be awarded solely against Newman and Warren, it is at once apparent that the prayer in all other respects is at utter variance with the material allegations of the complaint. An inspection of the allegations of the third-party complaint must be made to see whether or not the prayers are well founded. The prayer, no matter how complete of itself, cannot take the place of necessary antecedent pleading.

THIRD-PARTY COMPLAINT NOT ANCILLARY

Defendant's third-party complaint was not antillary to the main suit as is claimed by petitioner in certiorari.

In *Saunders* v. *B. & O. Railway Company* (D. C.) 63 Fed. Sup. 705, the legal definition of the word "ancillary" is given as follows: "Designating or pertaining to a document, proceedings, officer or office, etc., that is subordinate to or in aid of another primary or principal one." Applying this definition to the case at bar, it would seem that the third-party proceedings are not ancillary in any sense to the main case. They present an entirely different picture, with substituted defendants in place of the defendant named in the primary action. The District Court stated the matter succinctly in the following language:

> "It would seem, therefore, from the third-party complaint, that claims of the original plaintiff against third-party defendants, if any, would be separate and distinct actions and not in any respect ancillary to each other."

In the case of *Friend* v. *Middle Atlantic T. Co.*, (2 CCA) 153 Fed. (2nd) 778, the court said:

> "While there is strong argument for applying the concept of "ancillary" jurisdiction to the extent reasonably possible in order to secure the procedural advantages of the rule, the authorities which have made the more careful discrimination among the various possible situations have not supported its extension to the present one."

The *Friend* case is very much akin to the case at bar. Therein jurisdiction was denied a third-party complainant which sought to force citizens of the same state to litigate a case wherein jurisdiction depended upon diversity of citizenship upon the ground that such a cause could not proceed under federal rules.

The District Court's opinion in the case at bar on this point was as follows:

> "In the case at bar, the third-party plaintiff does not allege a joint liability with third-party defendants, or a right of action over against them, but denies it had any connection whatever with the transaction alleged in the complaint and asserts that third-party defendants, if any one, are solely liable. In other words, it simply asserts that the original plaintiff has sued the wrong person and that she should have brought the action against third-party defendants alone. It would seem, therefore, from the third-party complaint, that claims of the original plaintiff against third-party plaintiff and third-party defendant, if any, would be separate and distinct actions and not in any respect ancillary to each other. The third-party complaint does not present a joint tort, but the separate and sole tort of third-party defendants. To permit third-party plaintiff to bring in third-party defendants in this case, jurisdiction of which is based solely on diversity of citizenship, would be to allow it to force citizens of the same state to sue each other in the Federal Court against their will and at the behest of a party who has

no interest in their controversy. Such practice could also afford an easy method of fraudulent misjoinders." (R. 22.)

Friend v. *Middle Atl. T. Co.* (2 CCA) 153 Fed. (2nd) 778.

RULE 82

As applied to this case, Rule 82 forbids the court to construe Rule 14 (a) in a manner so as to extend or to limit the jurisdiction of federal courts. If the construction and scope to be given Rule 14 (a) by adversary counsel as applied to the third-party complaint in this case be adopted, both the jurisdiction of the federal courts as well as the venue of actions therein will be greatly enlarged. Should this Court reverse the Circuit Court, then, according to the allegations of the third-party complaint, a federal court will have taken jurisdiction of a controversy existing between Mrs. Reese, a citizen and resident of Georgia, and Newman and Warren, citizens and residents of Georgia, in a common law negligence suit involving no federal statute, although Akers Motor Lines, Inc., the original defendant, in attempting to bring Newman and Warren into the case, allege no facts entitling it to relief against the latter parties. The real controversy, according to third-party plaintiff, is one solely between Mrs. Reese and Newman and Warren, all of whom reside in Coweta County, Georgia. To sustain the third-party complaint would be violative of the local rule which says that contribution may not be enforced between joint tort feasors until judgment has been rendered against them.

Mashburn & Co. v. *Dannenberg Co.*, 117 Ga. Rep. 567, 583; 44 S. E. 97;

Chatt. Brick Co. v. *Braswell,* 92 Ga. Rep. 631, 633; 18 S. E. 1015.

Baltimore & O. R. Co. v. *Saunders* (4 CCA) 159 Fed. (2nd) 481 (5).

NO CONFLICT IN DECISIONS OF CIRCUIT COURTS

Adversary counsel in their brief contend that there is a conflict between two decisions of the Fifth Circuit Court of Appeals, viz., that rendered in the case of *Williams, et al* v. *Keyes, et al*, 125 Fed. (2nd) 208, and that rendered in the case at bar.

A close scrutiny of these cases will reveal that there is no conflict. The Circuit Court's opinion in the instant case alluded to the *Keyes* case and two other cases where the decisions were that the third-party complaints were ancillary to the main suit. The *Keyes* case did present a case for indemnity. Keyes and others brought suit in a Florida State Court against the United States Fidelity & Guaranty Company of Maryland, the surety upon a supersedeas bond given by Williams and others. Upon removal, United States Fidelity & Guaranty Company brought third-party proceedings against Williams and others, all of whom were residents of Florida. These third-party defendants, it appears, had agreed to "indemnify and save harmless" the United States Fidelity & Guaranty Company for all loss occasioned by the signing of the bond. A third-party complaint was sanctioned because it was a case where the surety company had the right of indemnification as against Williams and others.

The opinion of the Court in the *Keyes* case distinctly held that the cause alleged in the third-party complaint was ancillary to the main action.

There is no conflict between the *Keyes* case and the case at bar at this point because here it was held by the court that the third-party complaint did not assert "a right to indemnity ancillary to the main suit." (R. 29.)

Nor is the case at bar in conflict with *Sheppard* v. *Atlantic States Gas Company of Pennsylvania, Inc.*, (3 CCA) 167 Fed. (2nd) 841. In the *Sheppard* case, it will be seen that

the third-party plaintiff asserted a right of contribution against the third-party defendants who were alleged to be joint tort feasors. It was sanctioned, although the plaintiff in the main case and the third-party defendants were residents of the State of Pennsylvania, because it stated facts showing that the right of contribution existed. We quote from that decision as follows:

> "The basis of the third-party claim is the assertion by the defendant of its alleged right of contribution against the third-party defendants in accordance with the law of Pennsylvania, which is controlling in this respect."

The opinion of the Court in the case at bar on this precise question is as follows:

> "We do not construe appellants complaint as merely asserting a right to indemnity ancillary to the main suit, but rather as substituting a wholly separate and distinct cause of action from that alleged in the original complaint." (R. 28, 29.)

The Court further held that the *Keyes* case and like cases were neither applicable nor controlling. (R. 28.)

IN CONCLUSION

The third-party complaint in the instant case should have been dismissed on the following authorities:

Friend v. *Mid. Atl. T. Co.* (2 CCA), 153 Fed. (2nd) 778, (Certiorari denied, 66 S. C. 1370);
Hoskie v. *Prudential Life Ins. Co.* (E.D.N.Y.) 39 Fed. Sup. 305;
B. & O. R. Co. v. *Saunders* (4 CCA), 159 Fed. (2nd) 481;
People v. *Maryland Cas. Co.* (7 CCA), 132 Fed. (2nd) 850, 853 (Special opinion);
Brown v. *Cranston* (2 CCA), 132 Fed. (2nd) 631;
Morris, etc. v. *Rust Eng. Co.* (D. C.) 4 F.R.D. 307 (6).

Respectfully submitted,
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